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Notes

Fighting Corruption at the Local Level: The Federal Government's Reach Has Been Broadened

*Salinas v. United States*¹

I. INTRODUCTION

The Racketeer Influenced and Corrupt Organizations Act (RICO)² has produced a complex body of law. One area within the Act, conspiracy to violate the substantive provisions of RICO under Section 1962(d), has produced contrary views in the federal courts of appeals as to whether one must agree to personally commit the illegal, predicate acts, or whether one need only agree that another member of the conspiracy commit the acts. The United States Supreme Court has now settled the debate over this issue by holding that one need only agree that some member of the enterprise will commit the predicate acts.

II. FACTS AND HOLDING

Petitioner Salinas was the deputy at a county jail in Hidalgo County, Texas that was receiving federal funds for housing federal prisoners.³ Brigido Marmolego was the sheriff of that county and was involved in a scheme whereby he accepted funds from a prisoner, Homero Beltran-Aguirre ("Beltran"), in exchange for allowing Beltran to have "contact visits"⁴ with his wife, and at other times his girlfriend.⁵ Sheriff Marmolego was paid six thousand dollars per month plus one thousand dollars per visit.⁶ Petitioner Salinas, who managed the jail and supervised the prisoners, received a pair of watches and a pickup truck from Beltran for his assistance.⁷

Salinas was charged with two counts of bribery under 18 U.S.C. § 666(a)(91)(B), one count of violating Section 1962(c) of RICO, and one count of conspiracy to violate RICO under Section 1962(d). A jury acquitted Salinas of the substantive (Section 1962(c)) RICO count, but convicted him of the

1. 118 S. Ct. 469 (1997).

2. 18 U.S.C. § 1962 (1994).

3. *Salinas*, 118 S. Ct. at 472.

4. Contact visits, more commonly known as conjugal visits, allow a prisoner to meet privately and have sexual relations with his/her visitor.

5. *Salinas*, 118 S. Ct. at 472.

6. *Id.*

7. *Id.*

bribery and conspiracy to violate RICO counts.⁸ The Court of Appeals for the Fifth Circuit affirmed the decision.⁹

The United States Supreme Court also affirmed, holding that under the bribery statute it is not necessary that the bribe in any way affect federal funds.¹⁰ The Court further held that in order to be convicted of conspiracy to violate RICO, one did not have to agree to personally commit the predicate acts required under Section 1962(c).¹¹

III. LEGAL BACKGROUND

A. Conspiracy to Violate RICO

18 U.S.C. § 1962(d) states that "[i]t shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section."¹² Section 1962(c) makes it "unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."¹³ RICO defines "through a pattern of racketeering activity" as "at least two acts of racketeering activity" within a ten-year time frame.¹⁴ The "racketeering activity" is commonly referred to as "predicate acts." Actions that constitute "predicate acts" are set forth in a lengthy, detailed list which includes several federal and state criminal statutes.¹⁵

The issue in *Salinas* was whether the petitioner must have personally committed or agreed to commit two or more predicate acts to be found guilty of conspiracy, or whether it was sufficient just to agree to be a member of the enterprise and that some member of the enterprise would commit the predicate acts.¹⁶ The federal courts of appeals have been divided on this issue.¹⁷

8. *Id.* at 473.

9. *Id.*

10. *Id.* at 473-74.

11. *Id.* at 478.

12. 18 U.S.C. § 1962(d) (1994).

13. 18 U.S.C. § 1962(c) (1994).

14. 18 U.S.C. § 1961(5) (1994).

15. 18 U.S.C. § 1961(1) (1994).

16. *Salinas v. United States*, 118 S. Ct. 469, 476 (1997).

17. *Id.* The First, Second, and Tenth Circuits adopted the position *Salinas* argued, whereas the other circuits have adopted the government's position. Compare *United States v. Winter*, 663 F.2d 1120, 1136 (1st Cir. 1981), *cert. denied*, 460 U.S. 1011 (1983); *United States v. Ruggiero*, 726 F.2d 913, 921 (2d Cir.), *cert. denied sub nom. United States v. Rabito*, 469 U.S. 831 (1984); and *United States v. Sanders*, 929 F.2d 1466, 1473 (10th Cir.), *cert. denied*, 502 U.S. 846 (1991), with *United States v. Pryba*, 900 F.2d 748, 760 (4th Cir.), *cert. denied*, 498 U.S. 924 (1990); *United States v.* <https://scholarship.law.missouri.edu/mlr/vol64/iss1/10>

The First Circuit, in *United States v. Winter*, held that the United States Government must prove that the defendant agreed to personally commit two or more predicate acts.¹⁸ The court was persuaded by *United States v. Elliott*,¹⁹ which held that “[t]o be convicted as a member of an enterprise conspiracy, an individual by his words or actions, must have objectively manifested an agreement to participate, directly or indirectly, in the affairs of an enterprise through the commission of two or more predicate crimes.”²⁰ The defendant argued that he must have actually committed two predicate acts to be guilty of conspiracy. The very nature of conspiracy persuaded the court to accept the Government’s argument because “coconspirators need not have accomplished their underlying criminal goals to be found guilty of conspiracy.”²¹ Interestingly, in *United States v. Winter*, the Government took the position that the defendant must only agree to personally commit two predicate acts, whereas the defendant argued that he must actually commit two predicate acts. At that time, the United States Department of Justice manual for federal prosecutors also said that “every defendant in a proposed RICO conspiracy count must be shown to have agreed personally to commit two or more racketeering acts.”²² In later cases, defendants disputed the holding from *Winter* as the Government began to take an even broader approach to reading the statute. The parties in *Winter* did not raise the issue, nor did the court address, whether it could also be sufficient to merely agree that some member of the enterprise would commit the predicate acts.²³ This issue has dominated RICO conspiracy cases since *Winter*. In a later First Circuit case, *United States v. Aguilo*,²⁴ the court also focused on the lack of an overt act requirement in the RICO conspiracy statute.²⁵

Kragness, 830 F.2d 842, 860 (8th Cir. 1987); *United States v. Neapolitan*, 791 F.2d 489, 494-500 (7th Cir.), cert. denied, 479 U.S. 940 (1986); *United States v. Joseph*, 781 F.2d 549, 554 (6th Cir. 1986); *United States v. Adams*, 759 F.2d 1099, 1115-16 (3d Cir.), cert. denied, 474 U.S. 971 (1985); *United States v. Tille*, 729 F.2d 615, 619 (9th Cir.), cert. denied, 469 U.S. 845 (1984); and *United States v. Carter*, 721 F.2d 1514, 1529-31 (11th Cir.), cert. denied sub nom. *United States v. Morris*, 469 U.S. 819 (1984).

18. *Winter*, 663 F.2d at 1136.

19. 571 F.2d 880 (5th Cir. 1978).

20. *Winter*, 663 F.2d at 1136 (quoting *Elliott* 571 F.2d at 903).

21. *Id.*

22. *United States v. Neapolitan*, 791 F.2d 489, 494-95 (7th Cir.) (quoting U.S. DEP’T OF JUSTICE, CRIMINAL DIV., RACKETEER INFLUENCED AND CORRUPT ORGS. (RICO): A MANUAL FOR FEDERAL PROSECUTORS 72 (1985)), cert. denied, 479 U.S. 940 (1986).

23. *United States v. Winter*, 663 F.2d 1136 (1st Cir. 1981), cert. denied, 460 U.S. 1011 (1983).

24. 847 F.2d 956 (1st Cir.), cert. denied, 488 U.S. 928 (1988).

25. *Id.* at 964.

In *United States v. Ruggiero*,²⁶ the Second Circuit followed the *Winter* decision. However, the arguments made were a little different. The Government argued it was sufficient to prove that the defendant "was found to have conspired with others to engage through an enterprise in a pattern of racketeering consisting of predicate acts committed by others," whereas the defendant argued that he must have agreed to personally commit the acts.²⁷ Calling the Government's position an "extremely broad" interpretation of RICO, the court adopted the holding of *Winter* and reversed one defendant's conviction because he was convicted of only one conspiracy that could have been a predicate act.²⁸ The Tenth Circuit found *Ruggeiro* persuasive and adopted the rule that "the defendant must agree to personally commit two predicate acts, not merely agree to the commission of two predicate offenses by any conspirator."²⁹

The other circuits,³⁰ however, have taken the view that the defendant must only agree that the enterprise operate through a pattern of racketeering activity. These courts base their reasoning on three general arguments: the text of the statute, that a broad reading of RICO conspiracy follows general hornbook conspiracy law, and the purpose of RICO in combating organized crime.³¹

In *United States v. Neapolitan*,³² the Seventh Circuit, adopting the reasoning of the Eleventh Circuit, reasoned that when Sections 1962(d) and 1962(c) are read together, the statute "speak[s] only to conspiring to conduct or participate,

26. 726 F.2d 913 (2d Cir.), *cert. denied*, 469 U.S. 839 (1984).

27. *Id.* at 921. *See also* *United States v. Persico*, 832 F.2d 705, 713 (2d Cir. 1987), *cert. denied*, 486 U.S. 1022 (1988).

28. *Ruggiero*, 726 F.2d at 921. Defendant Tomasulo had been convicted of conspiracy to distribute heroin and conspiracy to run a gambling operation, and the court held the latter could not be a RICO predicate act. *Id.* at 918-20.

29. *United States v. Sanders*, 929 F.2d 1466, 1473 (10th Cir.), *cert. denied*, 502 U.S. 846 (1990).

30. The circuits include the Fifth, Fourth, Eighth, Seventh, Sixth, Third, Ninth, and Eleventh. *See* *United States v. Marmolejo*, 89 F.3d 1185, 1196 (5th Cir. 1996), *cert. granted sub nom.* *Salinas v. United States*, 519 U.S. 1198, *aff'd*, 522 U.S. 52 (1997); *United States v. Pryba*, 900 F.2d 748, 760 (4th Cir.), *cert. denied*, 498 U.S. 924 (1990); *United States v. Kragness*, 830 F.2d 842, 860 (8th Cir. 1987); *United States v. Neapolitan*, 791 F.2d 489, 494-500 (7th Cir.), *cert. denied*, 479 U.S. 940 (1986); *United States v. Joseph*, 781 F.2d 549, 554 (6th Cir. 1986); *United States v. Adams*, 759 F.2d 1099, 1115-16 (3d Cir.), *cert. denied*, 474 U.S. 971 (1985); *United States v. Tille*, 729 F.2d 615, 619 (9th Cir.), *cert. denied*, 469 U.S. 845 (1984); *United States v. Carter*, 721 F.2d 1514, 1529-31 (11th Cir.), *cert. denied sub nom.* *United States v. Morris*, 469 U.S. 819 (1984).

31. *See, e.g., Pryba*, 900 F.2d at 760; *Kragness*, 830 F.2d at 860. Furthermore, the courts have been persuaded by the language of the statute itself, because it only requires that one "participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity," *id.* at 854 (emphasis added), and does not speak only of conducting the affairs of the enterprise in such a manner.

32. 791 F.2d 489, 495 (7th Cir.), *cert. denied*, 479 U.S. 940 (1986).

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directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity."³³ The court also stated that "[t]he natural reading of this language is that 'through a pattern of racketeering activity' modifies the preceding language 'the conduct of such enterprise's affairs,' rather than . . . 'conspiring to conduct or participate.'"³⁴ Furthermore, RICO contains no explicit requirement that one agree to personally commit the predicate acts; it only requires that one "*participate, directly or indirectly*, in the conduct of such enterprise's affairs through a pattern of racketeering activity."³⁵ The Act does not speak only of conducting the affairs of the enterprise in such a manner.³⁶ The *Neapolitan* court was also persuaded by the two general rules of RICO construction: first, that the United States Supreme Court reads the statute broadly and literally, and second, that RICO is a remedial, not a substantive, statute.³⁷ The second general rule suggests that because RICO conspiracy is only an increased sanction for activity which is made criminal elsewhere in the United States Code, the courts should not require more than is needed for conspiracy to commit other crimes.³⁸

The second rationale that the appellate courts look to is that this interpretation of RICO conspiracy law follows general conspiracy law. "Under classic conspiracy law agreeing to the commission of the conspiracy's illegitimate objectives constitutes the crime."³⁹ As the Fourth Circuit stated, "[t]he heart of conspiracy is the agreement to do something that the law forbids. There is no requirement that each conspirator personally commit illegal acts in furtherance of the conspiracy or to accomplish its objectives."⁴⁰ To be convicted under the general conspiracy statute, 18 U.S.C. § 371, "a defendant need only agree to participate in the conspiracy with knowledge of the essential objectives of the conspiracy."⁴¹

33. *Id.* (quoting *Carter*, 721 F.2d at 1529).

34. *Id.* at 495-96 (quoting *Carter*, 721 F.2d at 1529 n.22).

35. *United States v. Kragness*, 830 F.2d 842, 860 (8th Cir. 1987) (emphasis added). The Eighth Circuit followed *Kragness* in *United States v. Leisure*, 844 F.2d 1347, 1367 (8th Cir.), *cert. denied*, 488 U.S. 932 (1988).

36. *Kragness*, 830 F.2d at 860.

37. *United States v. Neapolitan*, 791 F.2d 489, 495 (7th Cir.), *cert. denied*, 479 U.S. 940 (1986) (citing *Haroco v. American Nat'l Bank & Trust Co.*, 747 F.2d 384, 398 (7th Cir.), *cert. granted*, 469 U.S. 1157, *aff'd*, 473 U.S. 606 (1985)). RICO is "not ambiguous but which is, above all, deliberately and extraordinarily broad." *Haroco*, 747 F.2d at 398.

38. *Neapolitan*, 791 F.2d at 497. *See also* *United States v. Glecier*, 923 F.2d 496 (7th Cir.), *cert. denied*, 502 U.S. 810 (1991); *United States v. Stern*, 858 F.2d 1241 (7th Cir. 1988); *United States v. O'Malley*, 796 F.2d 891 (7th Cir. 1986).

39. *Neapolitan*, 791 F.2d at 496.

40. *United States v. Pryba*, 900 F.2d 748, 760 (4th Cir.), *cert. denied*, 498 U.S. 924 (1990). *See generally* *United States v. Kragness*, 830 F.2d 842, 860 (8th Cir. 1987).

41. *United States v. Carter*, 721 F.2d 1514, 1529 n.21 (11th Cir.), *cert. denied sub*

The third and final rationale given by the courts is that the general purpose of RICO would be frustrated by a narrow reading of the conspiracy statute. "[I]n enacting RICO, Congress found that 'organized crime continues to grow' in part 'because the sanctions and remedies available to the Government are unnecessarily limited in scope and import.'"⁴² The *Neapolitan* court was persuaded by the findings of the Organized Crime Control Act of 1970, which stated that the purpose of the statute is "to seek the eradication of organized crime in the United States . . . by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crimes."⁴³ The court therefore concluded that "it seems more likely that Congress, in search of means to prosecute the leaders of organized crime, intended § 1962(d) to be broad enough to encompass those persons who, while intimately involved in the conspiracy, neither agreed to personally commit nor actually participated in the commission of the predicate crimes."⁴⁴ The Eighth Circuit, in *United States v. Kragness*, also realized that a narrow reading of the RICO conspiracy statute would not achieve the purpose of the statute.⁴⁵

The circuits which hold that one need not agree to personally commit any acts basically agree about what it is one must agree to in order to be part of a conspiracy. The *Kragness* court said the defendant must have knowledge of the scheme or predicate acts.⁴⁶ The Fifth Circuit stated that the agreement need only establish that "each defendant must necessarily have known others were also conspiring to participate in the same enterprise through a pattern of racketeering activity."⁴⁷ The *Neapolitan* court provided a little more guidance, stating that "the defendant must manifest his agreement to the objective of a violation of RICO" through "an agreement to conduct or participate in the affairs of an enterprise, and an agreement to the commission of at least two predicate acts."⁴⁸

nom. *Morris v. United States*, 489 U.S. 819 (1984).

42. *Id.* at 1529 (quoting *United States v. Elliott*, 571 F.2d 880, 902 (5th Cir.), *cert. denied sub nom.* *Hawkins v. United States*, 439 U.S. 953 (1978)).

43. *United States v. Neapolitan*, 791 F.2d 489, 495 (7th Cir.), *cert. denied*, 479 U.S. 940 (1986) (quoting Statement of Findings and Purpose of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 923 (1970)). *See also* *United States v. Barton*, 647 F.2d 224, 237-38 (2d Cir.), *cert. denied*, 454 U.S. 857 (1981).

44. *Neapolitan*, 791 F.2d at 498.

45. *United States v. Kragness*, 830 F.2d 842, 860 (8th Cir. 1987).

46. *Id.*

47. *United States v. Sutherland*, 656 F.2d 1183, 1193 (5th Cir.), *cert. denied*, 455 U.S. 949 (1982). *See also* *United States v. Manzella*, 782 F.2d 533, 538-39 (5th Cir.), *cert. denied sub nom.* *Jimenez v. United States*, 476 U.S. 1123 (1986); *United States v. Martino*, 648 F.2d 367, 383 (5th Cir.), *cert. denied*, 456 U.S. 949 (1982).

48. *United States v. Neapolitan*, 791 F.2d 489, 498-99 (7th Cir.), *cert. denied*, 479 U.S. 940 (1986).

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A “mere association” with the enterprise is not sufficient for a conviction.⁴⁹ Furthermore, as with general conspiracy law, the existence of an agreement need not be express; it may be “inferred from the circumstances.”⁵⁰

B. Bribery Count

Section 666 makes it a crime if an agent of a state, local, or Indian tribal government or agency that receives federal funds in excess of \$10,000 “corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of \$5,000 or more”⁵¹ The issue in *Salinas* was whether the bribe must have affected the use of the federal funds received by the agency or governmental entity.

The majority of circuits that have addressed this issue have held that RICO does not require that the federal funds be affected by the bribery or theft. In *United States v. Coyne*,⁵² the defendant, a county executive, accepted bribes in exchange for ensuring that the county purchased cars from a long-time friend, and for providing funding for a dive rescue team to which this friend belonged.⁵³ The county received \$24,604,072 in federal aid, none of which was intended for purchasing the cars or equipment.⁵⁴ The court, focusing on the statutory language and legislative intent, held that

[t]he statutory language of Section 666 requires proof only that the accused be an agent of a local government that received in excess of \$10,000 of federal funds in the one year period. The language neither explicitly nor implicitly requires that the \$10,000 be directly linked to the program that was the subject of the bribe.⁵⁵

The defendant attempted to rely on the Senate Report accompanying Section 666, which stated that the Act was derived from Senate Bill 1630.⁵⁶ The committee report accompanying Senate Bill 1630 stated that a theft must be “from a [federally funded] program,” that a bribe must be “related to the administration of [a federally funded] program,” and that the “conduct sought to

49. *Id.* at 499.

50. *Id.* at 501 (citing *Glasser v. United States*, 315 U.S. 60, 80 (1942)).

51. 18 U.S.C. § 666(a)(1)(B) (1994).

52. 4 F.3d 100 (4th Cir.), *cert. denied*, 510 U.S. 1095 (1994).

53. *Id.* at 107-08.

54. *Id.* at 108.

55. *Id.* at 109.

56. *Id.* at 109-10.

be influenced by the bribe must be 'related to the administration of the [federally funded] program.'"⁵⁷ The court easily rejected the defendant's arguments, however, because that language was not included in Section 666 when it was passed in 1982.

In *United States v. Westmoreland*,⁵⁸ the Fifth Circuit came to the same conclusion. The defendant, Supervisor of Perry County, Mississippi, received "kickbacks" in the purchasing of county materials.⁵⁹ She argued, *inter alia*, that the federal statute did not apply in cases that only involved state funds.⁶⁰ That year, Perry County had received \$222,949 in federal revenue sharing funds, \$36,391.55 of which was allocated to Westmoreland's district.⁶¹ She argued that Section 666(a)(1)(B) required the involvement of over \$5,000 of *federal* funds.⁶² Finding the statutory language "plain and unambiguous," the court found no support for the proposition that "any transaction involving \$5,000 means 'any federally funded transaction involving \$5,000' or 'any transaction involving \$5,000 of federal funds'"⁶³ The court pointed out that the statute clearly read that

when a local government agent receives an annual benefit of more than \$10,000 under a federal assistance program, its agents are governed by the statute, and an agent violates subsection (b) when he engages in the prohibited conduct "in any transaction or matter or series of transactions or matters involving \$5,000 or more concerning the affairs of" the local government agency.⁶⁴

Furthermore, the court was persuaded because one of the purposes behind not including such a requirement was the difficulty of tracing federal funds.⁶⁵ Another reason not to require a direct affect on federal funds is the need to "preserve the integrity of federal funds by assuring the integrity of the organizations or agencies that receive them."⁶⁶ Finally, the court noted that "it is clear that Congress has cast a broad net to encompass local officials who may administer federal funds, regardless of whether they actually do."⁶⁷ Following *Westmoreland*, the Fifth Circuit summarily rejected the argument that the government had to prove that the cost of corruption would be paid with federal

57. *Id.* at 110 n.1 (quoting S. REP. NO. 97-307, at 726 (1981)).

58. 841 F.2d 572 (5th Cir.), *cert. denied*, 488 U.S. 820 (1988).

59. *Id.* at 573.

60. *Id.*

61. *Id.* at 575.

62. *Id.* at 575-76.

63. *Id.* at 576.

64. *Id.* (quoting 18 U.S.C. § 666(b) (1994)).

65. *Id.* at 576-77.

66. *Id.* at 578.

67. *Id.* at 577.

funds.⁶⁸ In *United States v. Smith*, the court also stated that “[t]he language in Section 666 is clear that it is not an essential element of this crime that the government trace the \$5,000 to specific federal government funds.”⁶⁹

At least one court, however, reached a different conclusion, driven by concerns of federal-state relations. In *United States v. Frega*,⁷⁰ the court concluded that the legislative history of Section 666 demonstrated that Congress intended a broad reach for the statute, but only as to the protection of federal funds.⁷¹ To allow federal interference otherwise “would drastically change the balance of power between federal and state governments by bringing conduct that had previously been entirely in the realm of the states within the federal purview.”⁷² The court was also persuaded against allowing the application of Section 666 to bribery of state court judges because California had a criminal statute that adequately addressed the conduct.⁷³

The Second Circuit, in *United States v. Foley*,⁷⁴ also stated that the connection between the bribery and the federal funds must be at least indirectly connected to the integrity of the federal funds in order for the conduct to fall within the reach of the statute.⁷⁵ The *Foley* court determined that the legislative history established that Section 666 was “not designed for the prosecution of corruption that was not shown in some way to touch upon federal funds.”⁷⁶

IV. INSTANT DECISION

A. Conspiracy to Violate RICO

The Court, following the general rule that “[w]hen congress uses well-settled terminology of criminal law, its words are presumed to have their ordinary meaning and definition,” looked to the general nature of conspiracy law to arrive at its holding that a defendant need not have agreed to personally commit the predicate acts.⁷⁷ Generally, a conspiracy exists, even if one does not agree to commit all of the acts himself.⁷⁸ It is a well-settled principle that “so long as they share a common purpose, conspirators are liable for the acts of their

68. *United States v. Little*, 889 F.2d 1367, 1369 (5th Cir.), *cert. denied*, 495 U.S. 933 (1990).

69. 659 F. Supp. 833, 835 (S.D. Miss. 1987).

70. 933 F. Supp. 1536 (S.D. Cal. 1996).

71. *Id.* at 1543.

72. *Id.* at 1540.

73. *Id.*

74. 73 F.3d 484 (2d Cir. 1996).

75. *Id.* at 490.

76. *Id.* at 493. Under the *Foley* standard, Westmoreland’s conviction would have been reversed.

77. *Salinas v. United States*, 118 S. Ct. 469, 476-77 (1997).

78. *Id.* at 477.

co-conspirators.”⁷⁹ This is true “even if a conspirator does not agree to commit or facilitate each and every part of the substantive offense,” or even when the defendant was completely “incapable of committing the substantive offense.”⁸⁰ The Court further pointed out that the RICO conspiracy statute is broader than general federal conspiracy in that it does not have the requirement of an overt act.⁸¹

In trying to explain the decisions of the circuit courts that have followed the contrary view, the Court pointed out that they may have been persuaded by the fact that “[i]n some cases the connection the defendant had to the alleged enterprise or to the conspiracy to further it may be tenuous enough so that his own commission of two predicate acts may become an important part of the Government’s case.”⁸² The Court concluded that “even if Salinas did not accept or agree to accept two bribes,” there was evidence of a conspiracy in that Salinas knew about Sheriff Marmolejo’s acceptance of bribes, which constituted the predicate acts, and agreed to facilitate the scheme.⁸³

B. Bribery Count

The Supreme Court focused on the clear language of the statute, holding that “[t]he prohibition is not confined to a business or transaction which affects federal funds.”⁸⁴ The petitioner argued that it was also necessary to consider the legislative history of Section 666.⁸⁵ The Court, however, pointed out that “only the most extraordinary showing of contrary intentions’ in the legislative history will justify a departure from that language.”⁸⁶ The Court looked to 18 U.S.C. § 201 to support its view of the legislative history. Section 201 was the general bribery provision in existence before Section 666, and applied only to “public officials” which were defined as “officer[s] or employee[s] or person[s] acting for or on behalf of the United States, or any department, agency, or branch of Government thereof . . . in any official function, under or by authority of any such department, agency, or branch.”⁸⁷ The courts applying Section 201 were split over whether a state or local employee could be considered a public official, which, according to the Court, prompted Congress to pass Section 666 to expand coverage to bribes taken by state and local officials.⁸⁸ The Court further

79. *Id.*

80. *Id.* (citing *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 253-54 (1940); *United States v. Rabinowich*, 238 U.S. 78, 86 (1915)).

81. *Id.*

82. *Id.* at 478.

83. *Id.*

84. *Id.* at 473.

85. *Id.* at 474.

86. *Id.* at 474 (quoting *United States v. Albertini*, 472 U.S. 675, 680 (1985)).

87. *Id.* (quoting 18 U.S.C. § 201(a) (1994)).

88. *Id.*

reasoned that Congress was reacting to the Second Circuit's narrow construction of Section 201 in *United States v. Del Toro*,⁸⁹ which held that a city employee was not a public official even though federal funds were heavily involved in the program he managed because the city had not yet formally requested the funding.⁹⁰

Salinas further argued that in order for Section 666 to apply to bribes not affecting federal funds, congressional intent to that effect must be clearly stated.⁹¹ However, the Court dismissed this argument by pointing out that "[a] statute can be unambiguous without addressing every interpretive theory offered by a party."⁹² The Supreme Court then unanimously affirmed the conviction.⁹³

V. COMMENT

Neither holding of the Court was a surprise, and both are well grounded in statutory interpretation and legislative intent. The Court followed the majority of the circuit courts in its RICO holding and remained consistent with all of the circuits that addressed the impact on federal funds issue in regards to Section 666. The real questions may be whether this is really the type of situation targeted by the RICO conspiracy statute, and whether the bribery statute is constitutional.

This holding is in tune with the federal conspiracy statute, Section 371, and common law conspiracy. At common law, the elements of conspiracy are: "(1) an agreement between two or more persons, which constitutes the act; and (2) an intent thereby to achieve a certain objective which . . . is the doing of either an unlawful act or a lawful act by unlawful means."⁹⁴ As the federal courts of appeals, and now the Supreme Court, have stated, the agreement to join an enterprise that has the objective of operating through a pattern of racketeering activity is the conspiracy. "The 'essence' of a conspiracy is 'an agreement to commit an unlawful act.'"⁹⁵ Furthermore, the Court does not overextend the reach of conspiracy because it still requires that the defendant must have agreed that someone in the enterprise would commit the acts, and not merely that the accused just have agreed to be a member of the enterprise. RICO conspiracy has

89. 513 F.2d 656 (2d Cir.), *cert. denied*, 423 U.S. 826 (1975).

90. *Salinas v. United States*, 118 S. Ct. 469, 474 (1997).

91. *Id.* at 474.

92. *Id.* at 475.

93. *Id.* at 478.

94. James Clann Minnis, *Clarifying RICO's Conspiracy Provision: Personal Commitment Not Required*, 62 TUL. L. REV. 1399, 1401 (1988) (quoting W. LAFAVE & A. SCOTT, CRIMINAL LAW § 6.4, at 525 (2d ed. 1986)).

95. Karen Anderson & Megan Bertron, *Federal Criminal Conspiracy*, 33 AM. CRIM. L. REV. 729, 732 (1996) (citing *Iannelli v. United States*, 420 U.S. 770, 777 (1975); *Pinkerton v. United States*, 328 U.S. 640, 644 (1946)).

not been reduced to guilt by association. This is also similar to general conspiracy law.⁹⁶

The purpose of RICO was to attack and break down organized crime. It was especially necessary because of the difficulty in prosecuting the heads of families for crimes because they had other people actually commit the crimes.

The crime leaders are experienced, resourceful, and shrewd in evading and dissipating the effects of established procedures in law enforcement. Their operating methods, carefully and cleverly evolved during several decades of this century, generally are highly effective foils against diligent police efforts to obtain firm evidence that would lead to prosecution and conviction. The crime chieftains, for example, have developed the process of "insulation" to a remarkable degree. The efficient police forces in a particular area may well be aware that a crime leader has ordered a murder, or is an important trafficker in narcotics, or controls an illegal gambling network, or extorts usurious gains from "shylocking" ventures. Convicting him of crimes, however, is usually extremely difficult and sometimes impossible, simply because the top-ranking criminal has taken the utmost care to insulate himself from any apparent physical connection with the crime or with his having to commit it.⁹⁷

It would not make sense for the Supreme Court to adopt any other holding because to do so would further insulate leaders of organized crime from conspiracy charges, except in the rare instances when they personally commit crimes.

The situation in *Salinas* did not involve organized crime. Nevertheless, it has become commonplace to extend RICO to situations other than organized crime, including political corruption,⁹⁸ white collar crime,⁹⁹ and violent groups.¹⁰⁰ Something that is always a concern is the necessity of punishing such

96. *Id.*

97. PERMANENT SUBCOMM. ON INVESTIGATIONS OF THE SENATE COMM. ON GOV'T OPERATIONS, ORGANIZED CRIME AND ILLICIT TRAFFIC IN NARCOTICS, S. REP. NO. 89-72, at 2 (1965). See also R. SALERNO & J. TOMPKINS, THE CRIME CONFEDERATION: COSA NOSTRA AND ALLIED OPERATIONS IN ORGANIZED CRIME 156 (1969).

98. See, e.g., *United States v. Bustamonte*, 45 F.3d 933, 935 (5th Cir. 1995); *United States v. McDade*, 28 F.3d 283, 289 (3d Cir.), cert. denied, 514 U.S. 1003 (1995); *United States v. Friedman*, 854 F.2d 535, 541 (2d Cir.), cert. denied, 490 U.S. 1004 (1989).

99. See, e.g., *United States v. Marubeni Amer. Corp.*, 611 F.2d 763, 766 (9th Cir. 1980).

100. See, e.g., *United States v. Wong*, 40 F.3d 1347, 1365 (2d Cir.), cert. denied, 514 U.S. 1113 (1995); *United States v. Thai*, 29 F.3d 785, 815-16 (2d Cir.), cert. denied, 513 U.S. 993 (1994); *United States v. Yarbrough*, 852 F.2d 1522, 1526-28, 1540, 1546 (1993). <https://scholarship.law.missouri.edu/mlr/vol64/iss1/10>

conduct under a federal statute when a state statute under which the defendant could instead be punished already exists. RICO has become “the prosecutor’s tool of choice against sophisticated forms of crime.”¹⁰¹ But how sophisticated is the crime of taking bribes for conjugal visits between inmates and spouses/girlfriends? More importantly, is going along with the Sheriff’s conduct really enough to say that Salinas joined an enterprise with conscious awareness that he was manifesting an agreement to operate their enterprise through a pattern of racketeering activity? Did Salinas agree that the Sheriff would accept the money in exchange for the conjugal visits, which constituted the predicate acts, or did he just go along with it so he could profit a little by the conduct? Chances are that Salinas did not realize he was becoming part of an enterprise, nor that he was agreeing on how the operation would run. He was simply taking bribes. Furthermore, no matter how reprehensible his conduct, it does not necessarily mean that he should have been prosecuted under RICO instead of a state bribery or corruption statute. Other than the money given to the prison each year to house prisoners, what federal connection justifies a federal prosecution for conduct that primarily impacted the operations at a county jail?

The reach of Section 666 is unquestionably broad after *Salinas*, especially when one considers that thousands of local governmental entities and all states receive federal assistance, and that ten thousand dollars is not a high minimum.¹⁰² The Court provided a clear interpretation of the statute that is easy to apply. The broad use of Section 666 to prosecute bribery not directly affecting federal funds has raised questions concerning its constitutionality.¹⁰³ The use of the statute as a general anticonspiracy statute has been questioned because of intrusion into an area of law traditionally left to state legislatures.¹⁰⁴ Some courts have attempted to take a narrower reading of the statute.¹⁰⁵ Their opinion, however, is the minority and is not even addressed by the *Salinas* decision.

Although the Court properly read the literal text of the statute, its avoidance of the federal-state issue could draw sharp criticism. The *Salinas* court stated only that the existing balance of federal-state power had to remain, absent a clear intention by Congress to change it.¹⁰⁶ However, the Court did not explain why the balance that existed prior to the passage of Section 666 was important, nor

(9th Cir.), *cert. denied*, 488 U.S. 866 (1988).

101. G. Robert Blakely & John Robert Blakely, *Civil and Criminal RICO: An Overview of the Statute and its Operation*, 64 DEF. COUNS. J. 36, 42 (1997).

102. See George D. Brown, *Stealth Statute—Corruption, the Spending Power, and the Rise of 18 U.S.C. § 666*, 73 NOTRE DAME L. REV. 247, 247 (1998).

103. *Id.* at 247.

104. *Id.* at 289-306.

105. See *United States v. Foley*, 73 F.3d 484, 490-93 (2d Cir. 1996); *United States v. Frega*, 933 F. Supp. 1536, 1540 (S.D. Cal. 1996); see also *United States v. Marmolejo*, 89 F.3d 1185, 1203-04 (5th Cir. 1996) (Jolly, J., dissenting).

106. *Salinas v. United States*, 118 S. Ct. 465, 474-75 (1997).

even what the balance was. To simply say that the statute is unambiguous may not be satisfactory. Additionally, the protection of the integrity of federal funds may not be a strong enough reason for applying the law to this type of situation. The defendant was a county deputy working in a county jail. The only federal connection in the case was the use of federal money to pay for housing the prisoners, yet it was not necessary for the Government to prove any effect on the federal program. The Government did not even have to prove the slight connection suggested by *Foley*, that the bribery was at least indirectly connected to the integrity of the federal funds.¹⁰⁷ An indirect connection standard would probably put an end to the criticism of Section 666 and questions concerning its constitutionality because a federal interest would then be implicated, even if only indirectly.

VI. CONCLUSION

The Supreme Court took a very literal reading of both the RICO conspiracy statute and the bribery statute. While the broad reading of RICO conspiracy is necessary to achieve the intended purpose of the statute, attacking organized crime, the application of the Court's holding to situations not involving organized crime may go too far. In those situations, the courts must carefully weigh the evidence presented by the Government that is offered to show that the defendant agreed to the operation of the enterprise through a pattern of racketeering activity.

The broad reading of the bribery statute is likely to draw criticism because of the weak link between the crime and the federal funds in many cases. Because essentially no link is required between the crime and the federal funds, the purpose of using the statute to combat local conspiracy raises eyebrows as to the constitutionality of such an application. We are left to rely on prosecutorial discretion to preserve the federal-state balance in fighting local corruption. Whether this is solid footing remains to be seen.

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107. *Foley*, 73 F.3d at 490.